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May 29, 1996

William Caton, Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W., Room 222  
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

Re: In the Matter of  
Implementation of Cable Act  
Reform Provisions of the  
Telecommunications Act of 1996

Notice of Proposed Rulemaking  
CS Docket No. 96-85  
FCC 96-154

Dear Mr. Caton:

Enclosed for filing please find an original and ten (10) copies of the Comments of the New Jersey State Board of Public Utilities with regard to the above captioned matter. We have included copies for each of the Commissioners.

Kindly place the Board of Public Utilities on the service list for this docket.

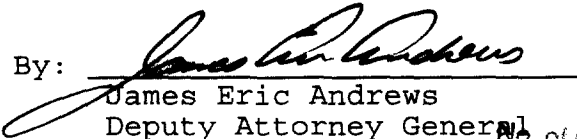
Please return one copy marked "filed" in the enclosed addressed, stamped envelope.

Thank you for your attention to this matter.

Very truly yours,

DEBORAH T. PORITZ  
ATTORNEY GENERAL OF NEW JERSEY

By:

  
James Eric Andrews

Deputy Attorney General

JEA/jw  
encs.

cc: Nancy Stevenson, Cable Services Bureau  
International Transcription Services, Inc.

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

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Notice of Proposed Rulemaking

COMMENTS OF THE NEW JERSEY  
STATE BOARD OF PUBLIC UTILITIES

INTRODUCTION

The New Jersey State Board of Public Utilities ("Board"), by its attorneys, respectfully submits comments in response to the issuance of a Notice of Proposed Rulemaking ("NPRM") in the above captioned matter which was released by the Federal Communications Commission ("Commission") on April 9, 1996. The Board has regulatory authority over cable television operations pursuant to N.J.S.A. 48:5A-1 et seq. The Board is also the franchising authority for cable television systems operated in the State of New Jersey pursuant to 47 C.F.R. 76.910(e).

In the Order and NPRM in the above docket, the Commission states that it is proposing final rules to implement certain provisions of the Telecommunications Act of 1996 ("1996 Act"), and in keeping with the intent of Congress, seeks to adopt clear rules which would streamline its processes and establish certainty for cable operators, local franchise authorities and subscribers. Order at paragraph 2. While the Commission has requested comment on a

number of issues, the Board is limiting its comments to the following areas of concern:

Implementation of the new effective competition standard to be used when cable operators are faced with competition from a LEC affiliated video programmer;

Implementation of the cable programming service tier ("CPST") complaint process; and

The interpretation of certain provisions of the 1996 Act as they relate to a local franchising authority enforcement of certain technical standards.

### **EFFECTIVE COMPETITION**

As noted in the Commissions Order, under the 1996 Act there is now a new fourth test for effective competition which is to be used for a determination of the regulatory status of a cable operator when it is faced with competition by a local exchange carrier ("LEC") or LEC affiliated provider of video services. Under this test, the Commission will find that there is effective competition when the provider of video services is in fact affiliated with a LEC, when the video service is indeed offered to subscribers in a franchise area in a manner which indicates the advent of competition, and when the video services offered are deemed comparable to that provided by the incumbent cable operator. Order at paragraph 7.

While the Board believes that it is unnecessary to comment on the methodology developed by the Commission as it relates to a determination on affiliate status and a determination on comparable programming, as the Commission notes, there remains a potential problem with regard to the meaning of the term "offer".

The issue here is whether there must be a finding of effective competition if a LEC or its affiliate's video service is offered to subscribers in any portion of the franchise area or whether the competitive video service must be offered to some larger portion of the franchise area for it to constitute effective competition. NPRM at paragraph 72. In other words, would it be correct to deregulate a cable operator whose service overlaps with that of a LEC affiliated video provider in only a small portion of a franchise area. This problem arises because, unlike the other tests for effective competition still used when the issue is whether there is effective competition between cable operators, there is no percentage pass rate or penetration rate included in the new fourth test for effective competition which would allow the Commission or a local franchising authority to draw a line to easily differentiate between a true competitive threat mandating rate deregulation, and an environment where the cable company would not be likely to lose many customers through competition.

The Board believes that deregulation of a cable operator's rates for service in an entire franchise area just because it is faced with competition in a small portion of that franchise area can lead to absurd results and in any case would not in all circumstances be in the public interest. For example, it is possible that a multi-channel multi-point distribution service (MMDS) operator affiliated with a LEC could provide video programming service to the entire franchise area of one cable operator and at the same time provide video service which overlaps

into a tiny portion of another cable operator's franchise area. Yet, under the new test for effective competition, because there is no minimum penetration rate or pass rate included, one interpretation of the language of the 1996 Act is that the cable operator in the second area should be deregulated even though it faces effective competition only in a tiny portion of that area. Another problem is that premature deregulation of a cable operator in an entire franchise area might result in the subsidization of subscribers in one franchise area by those in another or the subsidization of subscribers in a portion of a franchise area by those in the other portion. Thus, even though the new effective competition test might theoretically be met under the 1996 Act for the entire franchise area when just a tiny portion of that franchise area actually receives comparable video service by a LEC affiliated video provider, there still might be no real competition in those portions of a franchise area where it is not really offered. This situation would provide an incentive to a newly deregulated cable operator to raise rates in the area where no competition exists in an effort to subsidize its operations where it faces real competition from a LEC affiliated video provider.

Because the 1996 Act does not take account of the above problems, the Board concludes that the only way for the Commission to adequately protect against premature deregulation is to allow for the deregulation of cable rates in areas which in some cases would cover geographic regions that are actually smaller than the franchise area involved. In this way, cable operators will be in a

position to respond to competitive pressures in portions of franchise areas where there is real competition, while rate regulation in the rest of the franchise area is maintained.

Under the 1996 Act, the above approach would be permissible. Thus, under Section 301(b)(2) of the 1996 Act, rate structures need not be uniform where it has been shown that there is effective competition in any geographic area in which the cable operator provides service. It is noteworthy that the statute refers to geographic areas and not franchise areas, thereby allowing for greater flexibility with regard to variations in rates from place to place. This means that a cable operator should be free to charge whatever it likes when it is able to show to the satisfaction of the Commission that there is effective competition in any area of its franchise even though the remaining areas of the franchise involved remain subject to rate regulation. Such an approach also appears consistent with the effective competition standard itself at Section 301 (b) (3) of the 1996 Act. Moreover, it is consistent with the definition of "offer" at 47 C.F.R. §76.905(e), which merely provides that multichannel video programming is deemed offered when the distributor is physically able to deliver the service to potential subscribers with very little additional investment; the subscribers are reasonably aware that they may purchase the service; and there are no regulatory, technical or other impediments for potential subscribers to take service.

### CPST RATE COMPLAINTS

The Board supports the Commission's requirement that rate complaints must be filed by a LFA within 180 days of the effective date of a CPST rate increase once the LFA has received more than one subscriber complaint on the increase. Order at paragraph 22. The Board believes that this deadline is reasonable. In addition, it should be noted that there need not be a large number of subscriber complaints before a LFA files with the Commission. In this regard, Section 301(b)(1)(C) of the 1996 Act provides that there must be more than one complaint before a LFA files its complaint; meaning at least two, and it is not possible to construe a greater amount given this statutory language. See, Order at paragraph 21. Therefore, the Board recommends that the rules remain as proposed and that no consideration be given to changing the minimum number of complaints which must be filed with a LFA before the official filing of an LFA rate complaint with the Commission.

### TECHNICAL STANDARDS

Section 301(e) of the 1996 Act eliminates language from Section 624(e) of the Communications Act of 1934 which previously allowed franchising authorities to impose, pursuant to a Commission approved waiver, more stringent standards of operation on cable operators than those prescribed by the Commission. In its place, Section 301 provides language which clearly prevents states or franchising authorities from imposing any restrictions or conditions on a cable system operator's use of subscriber equipment

or transmission technology. Consistent with the 1996 Act, the Commission has made corresponding changes to its rules at Section 76.605.

The Commission seeks comment on how the above amendments to Section 624(e) affect the scope of the cable franchising, renewal or transfer process as it relates to technical considerations. In this regard, the Commission notes an apparent inconsistency in that the 1996 Act did not amend Section 626 of the Communications Act which still provides that "subject to Section 624", a franchise renewal proposal "shall contain such material as the franchising authority may require, including proposals for upgrade of the cable system", and that a franchising authority may consider the "quality of the operator's service, including signal quality" during the course of a franchise renewal. NPRM at paragraph 104, citing Section 626.

It is clear that Section 624(e) was changed by Congress because in its previous form it provided an avenue for a franchising authority to dictate the use or exclusion of a particular type of equipment or technology, rather than arrive at mutually agreeable standards. However, this does not mean that Congress' specific reference to equipment and transmission technology precludes local franchising authority oversight of a minimum level of technical quality relating to considerations such as standards for visual carrier to noise ratios, signal leakage, visual and aural signal levels to subscriber equipment or safety considerations such as bonding and grounding. Had it been

Congress' intent to alter the franchising process, the Board believes that it would have done so by: a) replacing the existing language in Section 624(e) with language specifically removing a franchising authority's ability to negotiate standards of a technical nature with a cable operator; and b) prohibiting enforcement by a franchising authority not only of technical agreements negotiated with a cable operator as part of the franchise agreement, but also of other agreements and commitments of a non-technical nature reached through the franchising process.

Therefore, the Board believes that the substitution of language in Section 624(e) without a concomitant change to Sections 626 on franchising leaves the franchising process largely unaffected, except that any agreements of a technical nature may not be conditioned upon the use or exclusion of a particular type of equipment or technology. For this reason there also appears to be no barrier under the 1996 Act to the negotiation of mutually acceptable standards.

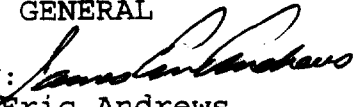
#### CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Commission consider the above discussion and concerns of the Board before the final promulgation of its rules.

Respectfully submitted,

DEBORAH T. PORITZ  
ATTORNEY GENERAL

Dated: 5/29/96

By:   
James Eric Andrews  
Deputy Attorney General